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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

## Nos. 76-1159 and 76-1416

ARTHUR F. QUERN, DIRECTOR OF THE ILLINOIS DEPARTMENT OF PUBLIC AID, ET AL.,
*Petitioners,*

*vs.*

VENUS MANDLEY, ET AL.,
*Respondents.*

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE,
*Petitioner,*

*vs.*

VENUS MANDLEY, ET AL.,
*Respondents.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## BRIEF FOR RESPONDENTS

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## BRIEF FOR RESPONDENTS

### QUESTIONS PRESENTED

The following question is presented to this Court for review and is not among those described in petitioners' briefs:

> If petitioners prevail on questions 1 and 2, whether the final judgment approved and ordered entered in *Mandley II* can

be upheld on the basis of the Equal Protection Clause and State law claims pressed below but not reached on appeal.

## STATUTES AND REGULATIONS INVOLVED

The following regulations and Illinois statute are set out as appendices to this brief: 45 C. F. R. § 233.10(a)(1)(i) and (ii); HEW Handbook of Public Assistance Administration, Part IV, §§ 3434.2, 5233 and 5520; Illinois Public Aid Code, § 12-8, Ill. Rev. Stat. ch. 23, § 12-8.

## STATEMENT

### Nature of the Case

On October 1, 1973 the Illinois petitioners, the Illinois Department of Public Aid (IDPA) and its director, predecessor to petitioner-defendant Quern, administratively restricted eligibility under the State's federally funded program of emergency assistance to needy families with children (emergency assistance program) authorized by §§ 402, 403(a)(5) and 406(e) of the Social Security Act (the Act). 42 U. S. C. §§ 602, 603(a)(5) and 606(e). In addition, petitioners imposed lengthy delays in delivery of this assistance to those eligible. These acts, and their approval by the federal petitioner, the U. S. Department of Health, Education and Welfare (HEW), were challenged in the United States District Court for the Northern District of Illinois by respondents, several impoverished families representing a class[1] excluded from benefits by these administrative changes and two organizations, the Illinois and the Chicago Welfare Rights organizations, whose participants are class members. Their civil

1. Petitioners' statements, Fed. br. 4; Il. br. 4, that respondents are Illinois recipients of aid to families with dependent children (AFDC) are only partially correct. The respondent class also includes all applicants for AFDC and other families with needy children. App. 15, par. 9; App. 143, par. 2.



rights complaint was twice upheld by the United States Court of Appeals for the Seventh Circuit, and relief restoring their federal rights has been granted although not yet enforced by the district court.

In March, 1971 Illinois submitted to HEW its first emergency assistance plan basing eligibility upon need as follows:

> § 6510 EMERGENCY ASSISTANCE PROVISIONS:
>
> *Active AFDC Only*
>
> (a) Paying delinquent rent or property payments allowed in lieu of rent to prevent eviction;
>
> (b) Paying delinquent utilities bills to restore discontinued service; and
>
> (c) Meeting immediate, emergent needs for other items of basic need included in the Standards of Assistance.

Limited moving costs were added later. Under that plan, assistance was provided after verification through disbursing orders (vendor payments) at the IDPA county/district offices. Needy families not eligible for AFDC were excluded unless their needs resulted from civil disorders. R. 1, A-2; Pl. Ex. 1, 67, 67b.[2]

On October 1, 1973 the Department severely constricted IDPA eligibility for emergency assistance.[3] In contrast to the

2. Three sets of references to the record are used. References to the record filed in the court of appeals in *Mandley I* are preceded by "R", the record filed on Mar. 21, 1975 (*Mandley I*), by R. I, and that filed in *Mandley II*, by R. II. Exhibits are identified as "Pl. Ex."/"D. Ex." Depositions are referred to as "Dep." and interrogatory answers are "Int." Transcripts of trial are "Tr."

3. HEW had provided Illinois federal funds for approximately three years without approving the plan. HEW officials did not contend that the scope of the 1971 plan was too liberal, although they did suggest that Illinois should be more specific in the listing of the emergencies it did compensate. Tr. at 332-38, Dep. of Jesse B. Harris, admitted into evidence as marked, 17-28. Under this plan in 1972, the petitioners paid out $1,665,481.37. From January through September, 1973 the IDPA paid $1,929,469.53. Int.

(Footnote continued on next page.)

prior program, the revised program, App. 25, limited assistance as follows:

> An "emergent need" exists when one of the following crisis situations occurs:
>
> 1. The AFDC family is homeless (without shelter) as a result of damage to the building rendering it uninhabitable (example: fire, condemnation).
> 2. A court-ordered eviction occurs for reasons other than the recipient's failure to pay rent.
> 3. The AFDC family is homeless (without shelter) due to damage to a portion of the building.
> 4. The AFDC applicant, determined presumptively eligible for AFDC, is in emergent need of clothing and/or household furnishings and equipment.[4]

**The Pleadings**

Respondents' complaint, basing jurisdiction on 42 U. S. C. § 1983 and 28 U. S. C. § 1343, sought to enforce the provisions of §§ 401 *et seq.* of the Act, 42 U. S. C. §§ 601 *et seq.*, the Fourteenth Amendment, and the Illinois Public Aid Code, Ill. Rev. Stat. ch. 23, § 12-8. It requested declaratory judgment and injunctive relief restraining the Illinois petitioners from

(Footnote continued from preceding page.)
24-26. R. 65. After the October 1, 1973 restrictions, payments fell to approximately $90,000 for the last quarter of 1973. Int. 25-26. R. 65. Illinois paid out $251,000 during the first six months of 1974. R. 131, Pl. Ex. 73.

4. At the hearing on respondents' motion for a preliminary injunction, the district court ordered the Illinois petitioners to add the following clause to paragraph 4:

> (Emergent food and rent can also be authorized by disbursing order at the time the applicant is determined presumptively eligible as provided in this paragraph. Any amount thus authorized may not exceed the amount calculated as the applicant's first month's payment, and will be deducted from the applicant's first month's payment.) App. 25-29.

This provision was deleted in March, 1976 without notice to the court or respondents. See IDPA Categorical Assistance Manual, § PO 610.5 (current).



denying emergency assistance to needy families eligible under the Act and the Public Aid Code and from imposing excessive delays in the delivery of this assistance. R. 1. The Illinois petitioners moved to join HEW as a defendant, R. 11, and the district court directed respondents to amend the complaint to accomplish the joinder. R. 27, App. 14-29.

HEW answered that Illinois' revised plan was "being reviewed." R. 51. Illinois' amended answer, R. 32, asserted HEW had approved this plan. Neither answer asserted that Illinois might claim or that HEW might grant reimbursement of funds expended as emergency assistance under any provision of Title IV-A of the Act other than §§ 406(e) and 403(a)(5).

**The Evidence**

Respondent Frances Gallman, the mother of six children who received AFDC from the State petitioners, was attacked, beaten and robbed of $550 by four assailants on the afternoon of November 23, 1973 just after alighting from a bus in Chicago. Lacking any other resources her family was destitute, but the IDPA denied emergency assistance because of the restrictions in the revised plan.[5] Mrs. Gallman's IDPA case-

5. Without emergency assistance the family's suffering grew in severity and complexity. When robbed, Mrs. Gallman was carrying the money to a landlord of an apartment she intended to rent. Mrs. Gallman was under pressure to move from her cousin's apartment, where she and her children were staying, after the landlord threatened eviction because too many people occupied the apartment. The amount stolen, which she had saved from previous public assistance checks, covered two month's rent and a security deposit. After the robbery, Mrs. Gallman was left with $30 until December 10 when she received her monthly check for December for $389. R. 103, § 1-6 par. 43.

When she received her December check, Mrs. Gallman rented an unfurnished apartment paying the landlord $140 for December's rent and $70 as a partial security deposit. She used her remaining funds for a deposit on a refrigerator and stove, food for her family, and blankets. For six weeks she and her children slept on the floor. Lacking a stove or refrigerator, the family ate out of cans heated on the radiator or ate fruit, cold cuts, cereal and other foods that did not have to be cooked or refrigerated. The family was without winter clothing since such items remained in storage in New York,

(Footnote continued on next page.)

worker referred her to a number of private organizations for help, including the Salvation Army and Red Cross. She received a small amount of food from these sources. Tr. 160-67.

The evidence adduced at trial demonstrated that many emergencies suffered by the class were not relieved by the IDPA, including evictions for non-payment of rent, destitution caused by theft and vandalism, utility failures or turnoffs, abandonment by a parent, and by delays and errors of the IDPA itself. Pl. Ex. 56.

The associate executive director of the United Way of Metropolitan Chicago (formerly the Council for Community Services in Metropolitan Chicago) and the executive director of Marillac House, a settlement house funded by Catholic Charities, testified at trial that the restrictions in the emergency assistance plan significantly increased the burdens placed on the private social service agencies and impaired their normal operations.[6]

(Footnote continued from preceding page.)
their previous residence. They searched alleys for discarded furniture but found little of use. On January 10th, when she received the next AFDC check, Mrs. Gallman purchased some basic furniture. Tr. 160-67.

6. IDPA referral slips to Marillac House revealed cases where AFDC recipients were denied assistance when their emergencies did not fall into one of the four categories of the revised program. R. 91:

> "Mrs. B. Jackson was robbed of $332 worth of food stamps and $200 cash. She has 11 children in her ADC budget. Robbery, which occurred 2-6-74 was verified by Police Report. Ms. Jackson has received some emergency food from Uptown Center and is in need currently." Pl. Ex. 21.
>
> "Mrs. Love's 3-74 check was reported lost—we have not been able to issue replacement to date and client probably won't receive it until 4-11-74. Family is in need of emergency food." Pl. Ex. 25.
>
> "Requesting food as electricity on their floor was shut off and their food spoiled." Pl. Ex. 27.
>
> "Mrs. Juanita Thomas appears to have abandoned her children to Mr. Lott and her oldest daughter Linda. We are in the process of setting up an ADC case for Linda and her brothers and sisters. Linda is not currently on aid nor has she any resources." Pl. Ex. 33.



Tr. 30ff, 212ff. Seventeen such agencies filed a brief *amici curiae* in the district court in support of respondents' position. R. 52-56, 59-61.

The director and deputy director of the IDPA testified that they constricted the availability of emergency assistance for administrative convenience and to prevent abuses and fraudulent claims. Tr. 365ff., 423ff. No further evidence detailing or corroborating the purported basis of the restrictions was offered. HEW presented no evidence.

**The District Court's Decision**

On November 21, 1974, the district court ruled that the eligibility limitations of the Illinois program did not violate either the Act or the Equal Protection Clause. It declined to rule on the pendent state claim. With respect to delivery of assistance, the court found delays of 7-10 days were "not uncommon" and in violation of the Act and HEW's "forthwith" regulation, 45 C. F. R. § 233.120(a)(5). The Illinois petitioners were ordered to modify their procedures to expedite delivery and to file a report on the speed of future delivery of emergency assistance. Respondents appealed the denial of an injunction restraining the Illinois petitioners from imposing eligibility requirements in addition to those contained in § 406(e).

The State petitioners then proposed to the district court certain changes to speed delivery. On March 14, 1975, the court entered another order, R. I 11, which required the IDPA to take certain steps to speed up the delivery of assistance in Cook County but denied respondents' request to require Illinois to furnish emergency assistance in downstate counties by a means other than mailing from Springfield, IDPA's central office. Respondents appealed that order.[7]

7. While the two consolidated appeals which became *Mandley I* were pending, the district court issued a third order on August 1, 1975, regarding the delay aspect of the case. It ordered another report on the time taken by State petitioners for delivery of assistance

(Footnote continued on next page.)

## The Court of Appeals' Decision in Mandley I

The court of appeals, relying on the Supremacy Clause and the Act, reversed the district court and held that Illinois was in violation of the Act by restricting eligibility for emergency assistance more narrowly than authorized in § 406(e) of the Act. No congressional intent to exclude the class could be found in the words of the statute or its legislative history. This decision rejected HEW's position that Illinois' program was lawfully funded. *Mandley* v. *Trainor*, 523 F. 2d 415 (1975).

Since the court decided the Supremacy Clause issue favorably to respondents it did not reach the equal protection or pendent State law claims. The mandate, which was returned October 24, 1975,[8] provided in part that "[t]he order of November 21, 1974, is reversed insofar as it sustained the validity of the Illinois program for emergency assistance." R. II 20.

## Proceedings on Remand to the District Court— Dismissal as Moot

On return of the mandate respondents promptly moved for entry of a final judgment and decree. App. 46-58. On November 17, 1975 IDPA director Trainor publicly stated that the IDPA would continue its illegal program and claim federal funds under §§ 402 and 403 of the Act. App. 83-96. The next day his counsel advised the district court that the "[4]06(e) . . . program will be terminated in a matter of days",

(Footnote continued from preceding page.)
and an explanation to show cause "why some emergency assistance cannot be disbursed by local offices rather than by the centralized procedure which is now in effect." The court directed respondents to file a proposed injunction order "which will incorporate a time schedule for the delivery of emergency assistance checks to recipients, including a specification of those exceptions which are reasonable and necessary to make any injunction order practicable and workable." R. I 10.

8. The court denied the Illinois petitioners' motion to stay the mandate pending application for certiorari. No petition was filed.



and that if the program were continued it would be with "state funds only and no reimbursement sought from the federal government". Tr. 6 (Nov. 18, 1975).

On December 1, 1975 the State petitioners moved to dismiss the case as moot, pleading,

> Effective November 21, 1975, the State of Illinois has withdrawn from participation in the Emergency Assistance Program established under Title IV of the Social Security Act, § 406(e) . . . [and] "the Department of Public Aid . . . is no longer receiving Federal Emergency Assistance Funds. . . ." App. 59 paras. 1, 4.

Shortly thereafter HEW joined in the motion. Respondents answered the motions controverting the facts asserted by petitioners. App. 66-96. Respondents presented evidence that the Illinois petitioners, contrary to their oral and written representations, continued to claim and receive federal funds for emergency assistance and were attempting to deceive the court by a fictitious abandonment of their federal emergency assistance program. Respondents claimed this was a misuse of federal funds.

The district court on December 31, 1975 denied the motions to dismiss. The court expressed its "belief that the defendant will not act irresponsibly or in bad faith to frustrate the attempt of this court and the United States Court of Appeals to enforce the statutes and Constitution of the United States", ordered petitioners to file objections to respondents' proposed final judgment, and continued the case for four months. R. II 46.

HEW in December, 1975 requested and received from this Court an extension of time to petition for certiorari from the judgment in *Mandley I*.[9] It also moved in the Court of Appeals to vacate *Mandley* and for an order directing the district court

9. HEW stated in its application that Illinois had "terminated its emergency assistance program" and that an extension was required to permit the court of appeals to consider a motion to vacate its judgment. Sup. Ct. No. A-537.

to dismiss the case as moot. The court of appeals denied the motion on January 30, 1976.

In January, 1976 petitioners filed objections to the proposed final judgment, claiming again that the case was moot. App. 97-105. Further, HEW asked the district court not to act on a final order until it obtained a ruling from this Court as to whether *Mandley I* was moot. App. 105.

On March 9, 1976 Trainor in a letter to the Legislative Advisory Committee admitted, "the special needs program we substituted affords the virtually same benefits and employs the delivery system we were using prior to the court's ruling that our program was not in accord with 406(e) of the Social Security Act". R. II 70, Ex. 2. On April 23, 1976 Trainor submitted to HEW, without notice to the district court or respondents, this "special needs program" for reapproval for federal funding labeled "special assistance." R. II 76, Ex. 1. The only difference between this program and the one judged illegally restrictive in *Mandley I* was the changed title, from "emergency assistance" to "special assistance". HEW did not advise the court or respondents that it had received this program, and its counsel on May 19, 1976 indicated to the court that Illinois had not submitted to HEW any plan for emergency assistance.

On July 12, 1976 counsel for the State petitioners admitted to the court Illinois' use of federal funds for its relabeled emergency assistance program but insisted it was not the same program litigated in this case. The district court dismissed the case as moot.

### The Court of Appeals' Decision in Mandley II

Respondents appealed the dismissal and on November 23, 1976 the court of appeals reversed, *Mandley* v. *Trainor*, 545 F. 2d 1062. The court ruled that "Illinois cannot evade the Section 406(e)(1) eligibility requirements by relabeling its emergency assistance program as AFDC 'special assistance'



while still obtaining matching funds from the federal government." 545 F. 2d at 1070. The court, noting that over three years had passed since the filing of the complaint and over one year since the return of the mandate in the first appeal, considered *sua sponte* the objections of the petitioners to the respondents' proposed final judgment. After modifying certain provisions of the order, the court directed the return of the mandate on the date the decision issued with a direction that the district court enter the order "forthwith". On November 29, 1976 the district judge signed the judgment.

The judgment, App. 142, prohibited Illinois from operating a federally funded program providing emergency assistance which was inconsisent with § 406(e). It granted relief from excessive delays in the delivery of assistance. Restitution was awarded to respondent Gallman. HEW was prohibited from funding State plans for emergency assistance, however designated, which did not comply with § 406(e) and was ordered to promulgate regulations consistent with the court of appeals' rulings. After certiorari was granted, the district court declined to enforce the judgment pending disposition by this Court.

## SUMMARY OF ARGUMENT

The purpose of the emergency assistance legislation as stated in § 406(e) of the Social Security Act (Act), 42 U. S. C. § 606(e), is for participating States to make various types of payments, speedily available to needy families without resources, in order to avoid destitution of children or to provide living arrangements for them in a home. Eligibility is based on financial need; no limitation exists as to the cause of the need, even if fault is involved (excepting refusal to accept employment).

Petitioner Illinois Department of Public Aid (IDPA) restricts eligibility, however, by establishing additional eligibility requirements which mandate that the emergency need arise from certain specified events. Petitioner U. S. Department of Health,

Education and Welfare (HEW) matches 50 percent of the amounts spent by IDPA as emergency assistance without securing the IDPA's compliance with the Act or with HEW's regulation interpreting eligibility under it.

The United States Court of Appeals for the Seventh Circuit has held that the IDPA cannot restrict the eligibility standard of § 406(e)(1) and that HEW cannot approve Illinois' restricted program for funding by the federal treasury. *Mandley* v. *Trainor*, 523 F. 2d 415 (1975); *Mandley* v. *Trainor*, 545 F. 2d 1062 (1976). The United States Courts of Appeals for the Second and Third Circuits are in accord. *Williams* v. *Wohlgemuth*, 540 F. 2d 163 (3rd Cir. 1976); *Lynch* v. *Philbrook*, 550 F. 2d 793 (2d Cir. 1977).

The Supremacy Clause invalidates Illinois' eligibility regulations which are more restrictive than governing federal standards contained in § 406(e). In addition, the IDPA's restrictions violate the Equal Protection Clause because the eligibility distinctions are arbitrary, irrational and invidious. They create two classes of eligible needy families with emergency needs, aiding one class and not the other. This discrimination is illegal. Moreover, the IDPA's restricted program violates § 12-8 of the Illinois Public Aid Code.

I. Title IV-A of the Act, provides for a federal determination of who is eligible for benefits and a State determination of the level of benefits an eligible individual will receive. Under this scheme of cooperative federalism Illinois may not restrict eligibility for emergency assistance more narrowly than Congress' definition in § 406(e) of the Act. Illinois' level of payments is not questioned in this case.

A. The federal definition cannot be varied by a State absent a clearly evidenced authorization in the statute or in its legislative history. *King* v. *Smith*, 392 U. S. 309 (1968); *Townsend* v. *Swank*, 404 U. S. 282 (1971); *Carleson* v. *Remillard*, 406 U. S. 598 (1972); *Burns* v. *Alcala*, 420 U. S. 575 (1975). The



respondent class is within the federal statutory definition. Petitioners point to no exclusionary language, nor can they do so. Rather, they argue that federal eligibility standards only set the outer limits of federal matching available to a State. This argument was rejected in *Townsend* v. *Swank*, 404 U. S. 282, 286 (1971) and *Carleson* v. *Remillard*, 406 U. S. 598, 600-01 (1972).

Petitioners also argue that a provision which is silent on emergency assistance, § 402(a)(10), justifies Illinois' exclusion of eligible needy families. The language and purpose of that provision, as explained in the cases cited above, is to assure that States provide assistance to *all* eligible individuals. This subsection is not clear evidence of exclusionary intent. Petitioners' view also contradicts Congress' intent to provide protection from destitution for all children. *King*, 392 U. S. at 330. If the statute be susceptible of two opposing interpretations, it must be read to effectuate, not frustrate, the major purpose of the draftsmen. *Shapiro* v. *United States*, 335 U. S. 1, 31 (1948).

B. The legislative history of § 406(e) confirms the plain reading of the statute. The House and Senate Reports clearly reflect an intent to expand eligibility. Congress determined that emergency needs, without limitation, are to be met at the time the need arises through its authorization of flexible forms of payments by the States. States were not authorized, as petitioners argue, to make a "flexible" determination of who is eligible for this aid.

Petitioners argue that an obsolete HEW regulation 45 C. F. R. § 233.120(a)(1) (1969), authorizes Illinois to specify who is eligible for emergency assistance. Both the federal and State petitioners overlook HEW's superseding regulation, 45 C. F. R. § 233.10(a)(1)(i) and (ii)(A) (1974), which applies to "public assistance" eligibility, including the emergency assistance program, and prohibits States from restricting the statutory eligibility determination absent an authorization in the Act or its legislative history.

The holding in *Mandley I* is based on the conflict between the federal eligibility definition in § 406(e) of "emergency assistance to needy families with children" and Illinois' definition of an "emergent [sic] need." This holding is consistent with the holdings of the cases above cited and with the Secretary's regulation enforcing the federal eligibility standards. 45 C. F. R. § 233.10(a)(1)(i) and (ii)(A) (1974).

II. After *Mandley I* the Illinois petitioners decided that abandonment of federal funding for emergency assistance was "totally unacceptable". App. 74. With the backing of the federal petitioner, HEW, the State devised a plan to avoid compliance with *Mandley I* whereby Illinois would relabel its emergency assistance program as "special assistance" and HEW would approve claims for federal funding as "special need" items under the aid to families with dependent children (AFDC) program.

A. If petitioners believed that funding emergency assistance as "special needs" was a legitimate alternative to the congressional plan, it is likely that they would have raised it as a defense long before they did. They first raised it in the court of appeals in *Mandley II*.

Their claim is without foundation. The federal petitioner acknowledged that neither Congress nor he has defined "special needs" or "special emergency need." HEW has a "special need" regulation, 45 C. F. R. § 233.20(a)(2)(v), which is silent on emergency assistance. Its predecessor in the agency's Handbook of Public Assistance Administration, Part IV, § 3131(3) (1966) does not describe this assistance either. Not cited by petitioners are other sections of this Handbook covering "emergency situations," §§ 3434.2 (1962), 5233 (1959), and 5520 (1951). The "special need" regulation is not authority for approving Illinois' retitling of its program.

Congress for the first time made express provision for emergency assistance in enacting § 406(e). Even if HEW had reimbursed emergency assistance provided as a "special need" prior



to 1968, Congress' enactment of §406(e) superseded any administrative practice or authority to continue to do so.

B. Congress has not granted dual authority for funding emergency assistance as petitioners claim. Sections 406(e) and 403(a)(5) reflect Congress' intent to induce the States to aid all children facing destitution. It chose one means in order to preclude patchwork provision of emergency assistance by the States. The distinct funding provisions for emergency assistance, § 403(a)(5), and for AFDC, § 403(a)(1), reflect this.

Section 406(e) specifies that if a State elects to provide the assistance authorized therein, provision for such assistance must be made in the State's plan under § 402(a). No variance exists between the express words of §§ 406(e) and 403(a)(5) and their legislative history regarding this specification. Congress, having so specifically directed the eligibility for and provision of the assistance, has necessarily excluded any other general means of providing it. *Williams* v. *Wohlgemuth*, 540 F. 2d 163, 169 (3d Cir. 1976).

Petitioners, in essence, argue that the attachment of "strings" to federal funds is unreasonable. Such an argument was long ago laid to rest. *Helvering* v. *Davis*, 301 U. S. 619, 645 (1937). To allow the result petitioners urge would be to grant HEW the power to veto the express words of §§ 406(e), 403(a)(5) and the legislative history.

III. The final judgment approved and ordered entered in *Mandley II* can be sustained on alternative grounds of the Equal Protection Clause or of Illinois law.

A. Illinois' program creates two classes of families with needy children who are living with a relative, without resources, and for whom aid is necessary to provide living arrangements or to avoid destitution. One class can receive assistance because its need arose from Illinois' selected crisis situations; the other class cannot because its need arose from other crisis situations.

1. Illinois' arbitrary selection of *events* from which destitution threatens does not rationally further the purposes of

§ 406(e) or any other legitimate articulated State interest. *United States Department of Agriculture* v. *Moreno*, 413 U. S. 528 (1973). *Burrell* v. *Norton*, 381 F. Supp. 339 (D. Conn. 1974). The State petitioners' desire to enhance administrative ease is not a sufficient basis for absolute disqualification of families from emergency assistance. *Vlandis* v. *Kline*, 405 U. S. 645, 656 (1972). Nor is their desire to avoid possible "abuses" of the program a ground to conclude all otherwise eligible needy families are submitting fraudulent applications. *Jimenez* v. *Weinberger*, 417 U. S. 628 (1975). Illinois has adequate alternative methods to handle fraudulent claims. Saving money seems to be the State's true purpose. That can be accomplished but not in the manner chosen. *Shapiro* v. *Thompson*, 394 U. S. 618, 633 (1969).

2. In addition, the arbitrarily excluded class is denied or threatened with denial of the fundamental right to survive. The classification is therefore subject to strict judicial scrutiny, and such scrutiny reveals no compelling State justification. This case differs from *Dandridge* v. *Williams*, 397 U. S. 471 (1970) and *Jefferson* v. *Hackney*, 406 U. S. 535 (1972). Those cases involved solely reductions in the amount of aid needy families received. In the instant case families have no resources and receive *no* aid. Individual and societal interests coincide to compel the granting of this aid because relief of individual suffering guards against the instability inherent in destitution. *Goldberg* v. *Kelly*, 397 U. S. 254, 265 (1970).

B. Section 12-8 of the Illinois Public Aid Code authorizes provision of emergency assistance to families eligible for AFDC in a variety of need situations and "in other circumstances causing privation." The command of the statute is mandatory and not, as the State petitioners suggested below, a mere "administrative device." *Figures* v. *Swank*, 128 Ill. App. 2d 211, 263 N. E. 2d 559 (1970); *County of Cook* v. *Ogilvie*, 50 Ill. 2d 379, 280 N. E. 2d 224 (1972).



IV. The court of appeals in *Mandley II* ordered the district court to enter respondents' proposed final judgment and decree as modified. This direction granted necessary relief against the petitioners to enforce the *Mandley I* judgment and to secure the rights of the respondents.

A. The federal petitioner neither sought review of *Mandley I* in this Court nor followed the court of appeals' suggestion that it issue a new regulation on emergency assistance to guide the States in complying with the congressional eligibility criteria. Since the petitioners on remand withheld good faith compliance from the district court, the court of appeals, in order to give effect to the policy of Congress, properly exercised its mandamus and equitable powers to require HEW to perform its mandatory duty to issue regulations "not inconsistent" with the Act, and to restrain approval of plans inconsistent with § 406(e). HEW's argument that § 406(e) does not require regulations is contrary to the policy of Congress. Act, § 1102, 42 U. S. C. § 1302; *Kingsbrook Jewish Medical Center* v. *Richardson*, 486 F. 2d 663 (2d Cir. 1973). Respondent families in Illinois have been injured because HEW has failed to administer the Act properly. Petitioner's conduct has made necessary the relief granted in *Mandley II*.

B. The Illinois petitioners have not completely abandoned federal funding of emergency assistance because that option is "totally unacceptable." App. 74. They are subject to the final order.

When directed by the district court after *Mandley I* to file objections to the proposed final judgment, the State petitioners offered no objections to the facts, conclusions or specific orders pertaining to delays. Nor did they raise any objection before the court of appeals in *Mandley II*. The Illinois petitioners, therefore, waived their objection to the judgment's provision requiring them to overcome delays by determining eligibility and authorizing payments of assistance within a 24 hour standard.

The district court found in November, 1974, that delays of 7-10 days in delivery were "not uncommon" and violated the Act and 45 C. F. R. § 233.120(a)(5), requiring "forthwith delivery". The final judgment incorporated the district court's conclusions and findings on this issue. In addition, when the State provides emergency assistance HEW regulations exempt it from the strict quality control and financial penalties for improper authorizations that apply to AFDC. 45 C. F. R. §§ 205.40 and 205.41. Illinois' administrative procedures for determining eligibility and authorizing payments which result in delays must yield to the federal policy of "forthwith" payment.

## ARGUMENT

### I.

### No Authorization Exists in the Social Security Act or Its Legislative History for Illinois' Exclusion of Eligible Individuals from Emergency Assistance to Needy Families with Children.

Title IV-A of the Social Security Act (the Act) authorizes a joint federal-State program of aid and services to needy families with children. §§ 401-410, 42 U. S. C. §§ 601-610. The general scheme of cooperative federalism in this Title is a federal determination of who is eligible for benefits and a State determination of the level of benefits an eligible individual will receive. *E.g., King* v. *Smith*, 392 U. S. 309 (1968).

Respondents' position, which the court of appeals in *Mandley I* upheld, is that Illinois may not restrict eligibility for emergency assistance to needy families with children more narrowly than the eligibility definition of § 406(e) of the Act. Respondents have not challenged Illinois' power to determine how much it will pay in emergency assistance to families made eligible by Congress. Nor have they asserted that Illinois may not make payments of AFDC, which are not payments as emergency assistance, as "special needs".



#### A. The Emergency Assistance Definition in Section 406(e) of the Act Sets the Standard of Eligibility.

Congress has authorized federal reimbursement for amounts paid out by States as emergency assistance as follows. Section 401 states the public purposes for grants to States for aid and services to needy families with children and authorizes an appropriation to carry out those purposes:

> There is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children.

Section 403 of the Act provides:

> (a) From the sums appropriated therefor, the Secretary of the Treasury shall . . . pay each State which has an approved plan for aid and services to needy families with children, for each quarter . . . (5) in the case of any State, an amount equal to 50 percentum of the total amount expended under the State plan during such quarter *as* emergency assistance to needy families with children. (Emphasis added.)

The eligibility definitions of Title IV-A are contained in § 406. That section states, "When used in this part . . ." (referring to Part IV-A of the Act, §§ 401-410) "emergency assistance to needy families with children" means assistance paid by the State to a (1) family with a needy child under age 21, (2) living now or recently with a relative specified in § 406(a), (3) who is without available resources and (4) the assistance is necessary to avoid destitution or to provide living arrangements in a home, and (5) whose need did not arise because such child or relative refused without good cause to accept employment or training for employment, but

> . . . only with respect to a State whose State plan approved under § 602 [§ 402 of the Act] of this title includes provision for such assistance.

Section 402(b) provides, "The Secretary shall approve any plan which fulfills the conditions specified in subsection (a) of this section." Subsection (a) specifies 28 requirements that a plan must meet to obtain approval.

The court of appeals in *Mandley I* applied the principle of statutory construction enunciated in a series of cases beginning with *King* v. *Smith*, 392 U. S. 309 (1968). This principle invalidates a State's denial of federally funded welfare payments or services to individuals made eligible by Congress in the Act. If the challenged State exclusion is not clearly authorized on the face of the Act, any departure from the statutory eligibility standard must be clearly evidenced by the legislative history. Also, *Townsend* v. *Swank*, 404 U. S. 282 (1971); *Carleson* v. *Remillard*, 406 U. S. 598 (1972); *Burns* v. *Alcala*, 420 U. S. 575 (1975). *Mandley I* adheres to these cases. The respondent class are persons included in the federal eligibility standard.

Their inclusion is confirmed by the court of appeals' analysis that "Section 406(e) specifically permits two areas of state discretion," *Mandley I*, 523 F. 2d at 420: (1) the form of the payment to be made (money payments, payments in kind, or other form of payment "as the State agency may specify"), and (2) whether migrant worker families will be eligible.[10] "This particularization of the area of state authority is itself cogent evidence that Congress did not also authorize the State [further] to limit eligibility. . . ." *Townsend*, 404 U. S. at 287.

Petitioners argue that § 406(e)(1) does not require them to aid all individuals made eligible by Congress but merely sets the outer limits of eligibility. Fed. br. at 29-30, Il. br. at 24. They do not point to any clear supporting statutory language. Petitioners would have this Court disregard *Burns*, *Carleson*, *Townsend* and *King* because their application prevents petitioners from having complete freedom to use federal funds as they deem

10. The statute also authorizes two other areas of discretion reserved to HEW, one concerning how recently a child must have lived with a relative described in § 406(a) and the other pertaining to what services a State may offer.



best. Such an arrangement this Court has not seen fit to sanction. *E.g.*, *Rosado* v. *Wyman*, 397 U. S. 397, 420-423 (1970); *Townsend*, 404 U. S. at 291-92. Neither did the court of appeals in *Mandley I* or in *Mandley II*.

*Mandley I* is also consistent with *Batterton* v. *Francis*, ____ U. S. ____, 53 L. Ed. 2d 448 (1977), in which this Court upheld Maryland's restrictive definition of "unemployment" in determining eligibility for the AFDC/unemployed father program of § 407. Section 407 on its face made eligible a child "who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father." HEW's standards authorized the exclusion complained of. In contrast, as the court of appeals in *Mandley I* correctly found, Congress has not delegated to the States or to the Secretary the power to exclude any individuals eligible under § 406(e)(1).

Petitioners argue that a State need not honor the § 406(e) definition because subsection (10) of § 402(a), which requires States to furnish AFDC with reasonable promptness to all eligible individuals, does not specifically mention the furnishing of emergency assistance. Respondents believe the result reached by the court of appeals would have been the same whether subsection (10) does or does not apply to the provision of emergency assistance.

The holding in *Mandley I* is based on the conflict between the federal eligibility definition of "emergency assistance to needy families with children" and Illinois' definition of an "emergent [sic] need". App. 25, 44.

This follows the operative principle in *King*, *Townsend*, *Carleson* and *Burns*, which is that those made eligible by § 406(a) may not be denied assistance absent evidence of clear legislative authorization to exclude them. In *King*, for example, the Court held, "The regulation is therefore invalid because it defines 'parent' in a manner that is inconsistent with § 406(a) of the Social Security Act." 392 U. S. at 333. The same reasoning

applies to § 406(e). This is also the construction HEW has applied in its regulation adopting these holdings, 45 C. F. R. § 233.10(a)(1)(ii)(A), which prohibits "more limited *public assistance* coverage than that provided by the Act. . . ." (Emphasis added.)

Subsection (10) is silent with regard to emergency assistance, as are all subsections of § 402(a). This silence cannot negate the plain language of § 406(e) and its legislative history. Petitioners do not present any evidence that subsection (10) made emergency assistance eligibility optional.

In any event, if a State incorporates § 406(e) into its plan, § 402(a)(10) then comprehends "emergency assistance to needy families with children" and therefore binds States to mandatory eligibility under § 406(e) as it does under § 406(a).

When Congress enacted the emergency assistance provisions in 1968 it did not explicitly amend § 402 to add "emergency assistance to needy families with children" at every relevant point, presumably because it is an optional program and the "must provide" requirements of § 402(a) do not become operative until a State opts to participate in this additional program of aid and services. It would be extraordinary, however, to conclude from this that Congress thereby intended that claimants of emergency assistance be *denied* the right to (a) the opportunity to make application, (b) the furnishing of emergency assistance with reasonable promptness, see *Adens* v. *Sailer*, 312 F. Supp. 923, 926 (E. D. Pa. 1970), and (c) the furnishing of emergency assistance to all eligible individuals, as required by § 402(a)(10). It would further be surprising that Congress intended to deny the "fair hearing" right to emergency assistance claimants, § 402(a)(4), or that the standard of need would not be applied to emergency assistance, § 402(a)(7). HEW admits that "[m]ost of the requirements set forth in Section 402(a) apply equally to AFDC and EA programs." Fed. br. 30.



The lack of clear authority in subsection (10) to exclude individuals eligible for emergency assistance is also apparent from its legislative history. The purpose of this provision, added in 1950, was to assure that *all* individuals eligible for assistance received some aid. Act of August 28, 1950, ch. 809, §§ 321 *et seq.*, 64 Stat. 548; S. Rep. No. 1669, 81st Cong., 1st Sess. 16-17 (1949); H. R. Rep. No. 1300, 81st Cong., 1st Sess. 43 (1949); *Jefferson* v. *Hackney*, 406 U. S. 535, 544-45 (1972); See also, *Townsend*, 404 U. S. at 291-92.

No indication exists that Congress meant to limit eligibility for emergency assistance through subsection (10). This view would require us, in the words of *King*, 392 U. S. at 330,

> . . . to assume that Congress, at the same time that it intended to provide programs for the economic security and protection of *all* children, also intended arbitrarily to leave one class of destitute children entirely without meaningful protection.

This would be a particularly astounding conclusion in light of the unmistakable purpose of the emergency assistance legislation to provide a fast and flexible method of delivery of assistance in times of crisis, legislation which expanded rather than contracted the AFDC program.

A statute must be read, "assuming that it is susceptible of either of two opposed interpretations, in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen." *Shapiro* v. *United States*, 335 U. S. 1, 31 (1948). Petitioners have yet to explain how Illinois' conduct with respect to, for example, respondent Gallman, furthers the purposes of either § 406(e) or of the Act as a whole. Her case is, indeed, an example of the thwarting of the explicit congressional policy to protect needy children in crisis.

**B. The Legislative History Confirms That § 406(e)(1) Eligibility Standards Are Binding on Participating States.**

A plain reading of § 406(e) reflects that Congress did not clearly authorize State deviation from federal eligibility standards contained therein. The policy expressed in the words of the statute is reasonable. This Court need look no further for Congress' intent. Should it, however, examine the legislative history, the intent reflected there fully supports the court of appeals' conclusion that Congress did not authorize the States to vary eligibility requirements from federal standards.[11]

The emergency assistance provisions grew out of omnibus amendments to social security legislation introduced by the Johnson Administration in 1967. One proposed amendment to the public assistance titles was a provision to require all States to pay full need according to respective standards of need (thereby eliminating maximum grants and percentage reductions in the level of benefits). Another proposal was a program for 60 days temporary assistance to migrant workers on a pilot project basis. H. R. 5710, § 207, 90th Cong., 1st Sess. 9. The full need provision, which would have required significant increases in welfare spending by the States, was not contained in the bill, H. R. 12080, reported out by the House Ways and Means Committee. However, the bill expanded considerably on the proposal for temporary assistance for migrant workers by adopting a provision which, in modified form, became § 406(e).

Eligibility under the new program was described in the general discussion of the bill as follows:

> . . . The eligible families involved are those with children under 21 who either are or have recently been living with close relatives. The families do not have to be receiving or eligible upon application to receive AFDC (although they are generally of the same type), but they must be without available resources and the payment or service must be necessary in order to meet an immediate need that would not otherwise be met.

11. The text of the Senate Report on the emergency assistance provision is set forth in the Appendix to this brief.



S. Rep. No. 744, 90th Cong., 1st Sess. 166. The report confirmed the statutory provision that assistance might be provided in any form. This was to allow States flexibility in meeting need at the time of the emergency. It also confirmed the statutory option for State participation in providing emergency assistance.

On the floor of the House, Representative Wilbur Mills, Chairman of the Ways and Means Committee, speaking in favor of the bill, stated, "The bill would provide for a new program of emergency assistance for families for a temporary period. This new program would allow Federal matching for a wide variety of services which families may need in an emergency situation for a short period of time. . . ." 113 Cong. Rec. 23054.

In the Senate, Senator Mansfield speaking in favor of the bill after the Conference Report, explained the provisions as follows:[12]

12. See also comments of Senator Ribicoff, 113 Cong. Rec. 32853; Senator Long, (113) Cong. Rec. 32592; Senator Curtis, 113 Cong. Rec. 36319. The Secretary infers from the latter Senator's remarks on the Senate floor (br. 20, N. 11) that the principal purpose of § 406(e) was to extend eligibility for emergency assistance to persons not eligible for it under the AFDC program, and from that inference concludes Congress recognized an authority in HEW to reimburse emergency assistance prior to the enactment of § 406(e). The Secretary's inference does not appear to be justified. The Senator said that reimbursement of emergency assistance "has not been in the law before," and it "can be paid in cases where they cannot meet other qualifications." No clear antecedent appears for the words "they" or "qualification." The Secretary suggests "recipients" and "such as eligibility for AFDC", a word and phrase respectively which do not appear in the text. Since it is the States' and not individuals that must meet the qualifications for federal matching and the Senator referred to States twice, these are more logically the reference for "they." Whatever the correct inference may be, an inference would hardly outweigh the clear language of the statute and reports.

> Families with emergency trouble will be able to receive emergency assistance in whatever form it is best for them at their time of need. Families which have been burned out, suffered personal tragedies and such will be able to get money, medical care, shelter provided, food sent in, or whatever else is needed to deal with the crisis. The committees are to be commended for adding this provision, thus, recognizing that emergencies which strike families cannot be dealt with by business-as-usual methods. . . . 113 Cong. Rec. 36925.

Petitioners argue that the description of flexibility in the form of emergency assistance in the legislative history requires a conclusion that Congress intended wide State flexibility in setting eligibility standards. Fed. br. 33, Il. br. 25. Flexibility in form of payment was to enable a State to meet the emergency need at the time of the need. Remarks of Senator Ribicoff, 113 Cong. Rec. 32853; Senator Mansfield, *id.* at 36925; Representative Mills, *id.* at 23053. This does not justify an inference that the Congress also intended to allow States flexibility in determining who would be eligible to receive this prompt assistance.

The Secretary further argues that the cost resulting from the congressional eligibility standard would have been greater than the projected federal cost, raising, he argues, an inference that "full" eligibility was not intended. Similarly, Illinois argues that expansion of eligibility would require a choice between increasing the welfare budget or drastic reduction of benefits, which, they say, is "no choice at all."

These arguments fail for several reasons. First, the option to participate leaves Illinois and other States free to protect the welfare budget, and that option was quite probably a factor in the level of appropriation.

Second, the 1967 projected cost estimate for 1972 of $35 million in federal payments is not clear evidence that Congress meant the State to have freedom to narrow the eligibility standards. If matched by State funds (at the 50-50 rate) it would total



$70 million. Illinois which has approximately 5 percent of the nation's population[13] would receive on a per capita basis $3.5 million, about double the amount it paid out as emergency assistance in 1972 before it severely restricted the program. The Secretary concedes, br. 34, n. 23, that the federal share "has cost less than Congress anticipated," $22 million instead of $35 million.

Third, Illinois in its pre-1973 program, which nearly met the eligibility standard of § 406(e)(1), paid only 0.14[14] percent of its public aid budget as emergency assistance, which makes its fear of facing drastic budget increases or benefit cuts less than well founded.

The legislative history reveals no "clear authorization" to the States or to the Secretary to permit the arbitrary "help-one-abandon-another" eligibility scheme at issue here. This is the unanimous conclusion of the circuit courts of appeals which have considered the question. *Mandley* v. *Trainor*, 523 F. 2d 415 (7th Cir. 1975); *Williams* v. *Wohlgemuth*, 540 F. 2d 163 (3rd Cir. 1976); *Lynch* v. *Philbrook*, 550 F. 2d 793 (2nd Cir. 1977). On the contrary, the history shows that as a "liberal"[15] provision of the 1968 amendments, Congress intended to ensure, despite belt-tightening in other areas, that the nation's children who face health or life threatening crises would be protected.

If the language and history of § 406(e) rule out State authority to vary eligibility requirements, it seems highly improbable that an HEW regulation could give a State this power. Yet this is the claim, based on 45 C.F.R. § 233.120(a)(1)(1969), advanced by

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13. According to 1970 census statistics Illinois' population was 11,112,797, 5.5 percent of the United States' population, which was 203,211,926. General Population Characteristics for the United States, Summary, 1970 Census of Population, P. C. (1-B1) Jan., 1972; General Population Characteristics for Illinois, Summary, 1970 Census of Population, P. C. (1-B) Oct., 1971.

14. ILL. DEPARTMENT OF FINANCE, 55TH ANNUAL REPORT FOR FISCAL YEAR 1972 (1973) at 193. The total budget for 1972 was $1,182,595,500. Emergency assistance expenditures totalled $1,665,481. Int. 24-26, R. 65.

15. See remarks of Senator Curtis, 113 Cong. Rec. 32853.

the Secretary and the Illinois petitioners. Fed. br. 28, Il. br. 25. Both petitioners in their respective briefs overlook HEW's superseding regulation, which applies to emergency assistance and denies States this power. 45 C. F. R. § 233.10(a)(1)(ii)(A) (1974). See Appendix to this brief. It may seem surprising that one governmental agency would overlook an important regulation which the court of appeals found relevant, 523 F. 2d at 421, but when two separate governments having intimate knowledge of HEW's regulations do so, it leaves the strong impression that the failure to discuss or cite it was more than an oversight.[16]

HEW's "Townsend regulation," 45 C. F. R. § 233.10(a)(1) (i) and (ii), provides as follows:

> (i) A State shall impose each condition of eligibility required by the Social Security Act; and (ii) A State may:
>
> (A) Provide more limited public assistance coverage than that provided by the Act only where the Social Security Act or its legislative history authorizes more limited coverage; . . .

Prior to promulgation of these subsections, in *Carleson*, the Solicitor General's Memorandum for the United States as Amicus Curiae (at 8-9) had expressed the fear that if the Court meant what it said in *Townsend*, most State plans would be invalid. This Court repeated that it "expressly disapproved" the HEW policy that permitted States to vary eligibility requirements from federal standards. *Carleson*, 406 U. S. at 600-01. When the "Townsend regulation" was published on July 24, 1974, 39 Fed. Reg. 26,912, the Acting Secretary there noted that he had frequently received the following comment on the regulation as proposed:

> 2. The regulation should be broader to permit the States to limit coverage as well as impose additional eligibility conditions; . . .

16. Nor does the Massachusetts brief amicus curiae mention or cite 45 C. F. R. § 233.10(a)(1)(i) and (ii)(A). The New Jersey brief amicus curiae, however, states, br. 17, that this regulation was relied upon in *Mandley I* and *Williams* v. *Wohlgemuth*, 540 F. 2d at 170. New Jersey argues that it does not apply in *Mandley*. These States offer no arguments in addition to those petitioners present, and therefore they do not appear to warrant response. These States are defendants in pending federal court cases involving § 406(e); *Ingerson* v. *Sharp*, 423 F. Supp. 139 (D. Mass. 1976), appeal pending, and *Wise* v. *Klein* (D. N. J. No. 76-274, filed 1976).



HEW's response was as follows:

> 2. The current state of the law as interpreted by the United States Supreme Court does not permit a broader regulation.

This regulation applies to "financial assistance programs," of which emergency assistance is one. With this provision in view, HEW's plea for deference to § 233.120(a)(1) fails. One, any reliance by a State on 45 C. F. R. § 233.120(a)(1) to cut back eligibility from the federal standard after *King* was dubious, and after *Townsend*, *Carleson*, and the promulgation of 45 C. F. R. § 233.20(a)(1)(ii)(A), a plain disregard of federal law and policy.

Two, the Secretary's argument that 45 C. F. R. § 233.120 (a)(1) is "without amendment", Fed. br. 28, is not correct except in a most technical sense, since it was superseded by 45 C. F. R. § 233.10(a)(1)(i) and (ii). Section 233.120(a)(1) should have been amended to conform to the superseding regulation at the time the latter was issued.

Three, a regulation challenged within five years of its promulgation is difficult to label "long-standing."[17]

17. Nor can respondents make a convincing claim of congressional acquiescence in the regulation HEW relies on. First, it was superseded as discussed. Further, extensive welfare reform legislation was considered by the 91st and 92nd Congresses, including the emergency assistance provisions, but the entire legislative package died because the conferees "were unable to agree on the underlying principle of welfare reform. All efforts to amend AFDC were postponed for another session of Congress." *Burns*, 420 U. S. at 585.

Several miscellaneous provisions (not pertinent here) affecting the AFDC program and contained in another title of the social

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Thus, to the extent this legislative history sheds any light, it tends to rebut the claim that Congress by silence has acquiesced in HEW's view of the 1968 emergency assistance provision. See *Burns*, 420 U. S. at 585-86.

The restrictive eligibility requirements which Illinois has imposed and which HEW has approved are contrary to the Act. The legislative history discloses no authorization for these restrictions. *Mandley I* should be affirmed.

## II.

## HEW LACKS AUTHORITY TO APPROVE REIMBURSEMENT OF EMERGENCY ASSISTANCE RELABELED "SPECIAL ASSISTANCE" WHICH EXCLUDED NEEDY FAMILIES ELIGIBLE UNDER § 406(e).

After *Mandley I* the Illinois petitioners decided that abandonment of federal funding for emergency assistance was "totally unacceptable."[18] App. 74. But they would not comply with *Mandley I* because they believed expanding eligibility would cost more money. App. 72-76; Il. br. 28-29. Thus they embarked, with the help of HEW, on a simple plan to relieve themselves of the "dilemma," Il. br. 28, posed by judicial enforcement of § 406(e)(1). Illinois renamed the program "special assistance" and submitted it to HEW for approval for funding as "special needs", Il. br. 7-8, under the AFDC program funded through § 403(a)(1). The Secretary admits that "in place of that program [held illegal in *Mandley I*], the State began paying

(Footnote continued from preceding page.)
security bill did pass. However, the amendment to § 403(a)(5) to which the Secretary alludes was not one of them. This amendment was a small section of the lengthy State and Local Fiscal Assistance Act of 1972, which was not a social security bill. It had no bearing on eligibility but only reduced from 75% to 50% federal participation in services which the Secretary may authorize under § 406(e)(1)(B).

18. Ill. Rev. Stat. ch. 23, § 12-4.5 directs Illinois to obtain all available federal funds.



emergency benefits under its AFDC program, subject to essentially the same eligibility restrictions and coverage limitations, and receiving federal reimbursement pursuant to § 403(a)(1)." Br. 14. Illinois admits that "the 'special assistance' program provides virtually the same benefits as was provided by the § 406(e) emergency assistance program." Br. 21. The petitioner governmental agencies and respondents, then, are in full agreement that Illinois, with the backing of HEW, devised this method to avoid *Mandley I*.

Petitioners' asserted belief that "special assistance" is a legitimate alternative to § 406(e) is belied by their failure to raise it as a defense prior to their argument before the court of appeals in *Mandley II*. They attempted, moreover, to hide their "special assistance" program from judicial scrutiny. This leaves the distinct impression that they lacked confidence in the validity of the purported alternative. The court of appeals in *Mandley II* correctly struck down this "artifice." *Mandley II*, 545 F. 2d at 1067.

### A. HEW Lacks Authority to Fund Emergency Assistance Payments Under Its "Special Need" Regulation.

Petitioners' principal argument in support of their "double-funding" theory is that HEW had authority to reimburse emergency assistance prior to the enactment of §§ 406(e) and 403(a)(5) in 1968. These provisions, they say, were merely tacked on to this pre-existing authority for the purpose of including families not eligible for AFDC and to authorize payments other than money.[19] This pre-existing source supposedly supplied the power to approve a "special need" or "special emergency need." Fed. br. 15-16. Congress has not defined these

19. They do not mention that Illinois' "special assistance" would not be speedily available under AFDC since, as the Committee reports observed, the process of determining eligibility and authorizing payments had precluded States from meeting emergency needs. H. R. Rep. No. 544, 90th Cong., 1st Sess. 109; S. Rep. No. 744, 90th Cong., 1st Sess. 165-66.

terms and neither, concedes the Secretary, has he. An HEW regulation, 45 C. F. R. § 233.20(a)(2)(v), purports to allow a State to recognize "special need items" for AFDC recipients but does not identify the items and is silent on "special emergency needs." Nevertheless, the Secretary states "it has been well understood that the term includes . . . emergency needs." Br. 16. Understood by whom is not stated. Respondents do not believe HEW possessed authority to reimburse payments for emergency assistance as "special needs" prior to, or after, the 1968 legislation.

The Handbook of Public Assistance Administration, Part IV, § 3131(3) (1966)[20] contains the "special need" provision later issued at 45 C. F. R. § 233.20(a)(2)(v). Like its successor regulation, this Handbook material contains no description or even mention of "emergency assistance." Several other provisions of the Handbook, however, do mention "emergency situations," § 3434.2 (1962); "emergency payee," § 5233 (1959); "emergency situations" before "complete investigation of eligibility," § 5520 (1951).[21] These Handbook Sections are set out in the

20. "If provision is made for special needs in State's plans under titles I, IV, X, XIV, and XVI, the circumstances so recognized must be such as to necessitate expenditures not necessary for all individuals. The State plan must contain a description of the specified circumstances affecting the need of individuals which the State agency will recognize by including additional consumption items for all individuals in those circumstances. A differentiation can be made for different living arrangements, such as costs for room and board, restaurant meals, or nursing home care."

21. Sections 3434.2 and 5233 purported to allow a narrow expansion of caretaker eligibility under § 406(a) when a child already receiving AFDC lost his or her caretaker relative because of death, desertion, imprisonment, or commitment to a mental hospital and was in the care of a non-relative "acting for relatives." However, § 406(a) did not authorize payments to non-relatives except after 1961 through foster home care under § 408 once a judicial placement was made (which required time). Section 5520 claimed to encourage States to pay AFDC applicants in emergency situations before the full eligibility investigation was completed. This encouragement was undermined by the subprovision of § 5520 inform-

(Footnote continued on next page.)



Appendix to this brief. The Secretary does not cite these sections. They do not pertain to and are not described in the "special need" regulation, § 3131(3). The absence of mention of emergency needs in § 3131(3) coupled with its presence in other sections of the Handbook is a strong indication that § 3131(3) was not an established source or permission for "special emergency needs."

In practice, "special need" items have been used by States with HEW approval to meet regular recurring expenses for many but not all recipients. Common examples are allowances for laundry, telephone, special diets, medicine chest supplies, expenses for securing employment, medical transportation, property repairs, insurance, housekeeper service, child care and education expenses.

HEW's most recent edition of "Characteristics of State Plans for Aid to Families with Dependent Children Under the Social Security Act, Title IV-A" relates only an incidental use by a handful of States (California, Hawaii, North Dakota, Rhode Island and Wisconsin) of "special circumstances items" to meet emergency needs as AFDC "special needs." The Secretary advises this Court, br. 16, that 45 States provide special need items but fails to mention that in practice only five States include a few emergency needs. States that meet emergency needs do so usually under the emergency assistance program established by § 406(e).

HEW funding of emergency assistance as "special needs" is not authorized by its "special needs" regulation.

(Footnote continued from preceding page.)

ing a State that such payments were "on its own responsibility" and "cannot be matched with Federal funds until investigation is completed and eligibility established." § 5520(3)(b) and (d). These Handbook references to emergencies, §§ 3434.2, 5233, 5520, were narrowly limited and of questionable validity as authority for HEW funding of emergency assistance.

## B. Sections 406(e) and 403(a)(5) Preclude Petitioners' Double Funding Theory for Emergency Assistance.

The language of § 406(e), and its companion, § 403(a)(5), reflect Congress' intent to provide one means of funding State plans for emergency assistance in order to accomplish its purpose of alleviating the destitution of needy children. Any pre-existing administrative authority to provide emergency assistance was superseded by these provisions. The express language of the provisions precludes the dual authority petitioners claim. If their double funding theory were allowed, the States would be able to exercise an amendatory veto over congressional eligibility policy and thus defeat the purpose of the legislation. *Mandley II* properly interprets the statute and its legislative history to prohibit Illinois' and HEW's circumvention of Congress' explicit eligibility provision.

To encourage States to meet the emergency needs of the families defined in § 406(e), Congress has distinctly separated the funding of emergency assistance from that of aid to families with dependent children. The funding provision, § 403(a), requires in relevant part, as follows:

> (a) From the sums appropriated therefor, the Secretary of the Treasury shall . . . pay to each State which has an approved plan for aid and services to needy families with children. . . .
>
> • • • • •
>
> (1) in the case of any State . . . an amount equal to the sum of the following proportions of the total amounts expended during such quarter *as aid to families with dependent children* under the State plan. . . . (Emphasis added.)[22]
>
> • • • • •
>
> (5) in the case of any State, an amount equal to 50 per centum of the total amount expended

22. According to HEW, the reimbursement formula varies from 50% to 83⅓%. Br. 26.



> under the State plan during such quarter *as emergency assistance to needy families with children*. (Emphasis added.)

Assistance under AFDC is limited in § 406(b) to "money payments," "medical care," or "remedial care." Emergency assistance, however, may also be provided by "payments in kind, or such other payments as the State agency may specify . . .," and "such services as may be specified by the Secretary." § 406(e).

The language of §§ 406(e) and 403(a)(5) reflect that Congress meant to compensate States that made payments *as* emergency assistance to needy families with children without regard to how a particular State might title the assistance. It did not authorize alternative provisions for emergency assistance under § 406(e) and also under § 402(a) as a "special need." Congress specified that the provision for emergency assistance must be incorporated into a State plan for "aid and services to needy families with children" required by § 402(a). "Special needs," if given, would also be included in the State's § 402(a) plan. Congress' definition of emergency assistance must be followed in a State plan if a State grants emergency assistance. Any "special need" provision for emergencies inconsistent with Congress' definition would be invalid. Here, as elsewhere, the specific controls the general. *Williams* v. *Wohlgemuth*, 540 F. 2d 163, 169 (3rd Cir. 1976).

Thus, to the extent that regulations may have authorized HEW to make payments for emergencies, they were superseded by the congressional enactment of § 406(e), which gave clear authority and direction for State provision of emergency assistance. The congressional view reflected in the legislative history is that HEW had not provided for emergency assistance. Congress created a "new program",[23] a "change in the present law,"[24] under

23. H. R. Rep. No. 544, 90th Cong., 1st Sess. 4; 113 Cong. Rec. Cong. Rec. 23053, 36319.

24. 113 Cong. Rec. 32853.

which, "for the first time, the Federal Government will match money for emergency assistance," a provision "many of the States have asked for."[25] This was also HEW's view as reflected in the testimony of its sole witness at the hearings of the Senate Committee on Finance on the 1968 amendments. Undersecretary Wilbur J. Cohen stated,

> There is no mechanism in the existing Federal law to meet the special needs of children which may arise in a crisis situation.

Social Security Act Amendments of 1967, Hearings on H. R. 12080 before the Senate Committee on Finance, 90th Cong., 1st Sess. 270.

Significantly, petitioners do not advocate a statutory analysis contrary to that of the court of appeals. The Secretary states, without support from the words of the statute, that "nothing" (br. 15) in Title IV-A precludes what Illinois dispenses as "special assistance." To the contrary, nothing in § 406(e) allows a State to restrict eligibility once it decides to enter the program. This Court's decisions have interpreted Title IV-A to place the burden upon the government wishing to exclude federally eligible individuals to demonstrate that Congress clearly authorized the exclusion (Part I, *supra*). The petitioners have not met that burden.

Petitioners suggest, Fed. br. 23-27, Il. br. 21, that important distinctions exist between emergency assistance and AFDC. Some distinctions are clear on the face of Title IV-A as noted above. Petitioners, however, never presented to the district court these distinctions or any other valid reason to justify relabeling Illinois' program. On the contrary, these arguments appear to

25. 113 Cong. Rec. 36319 (Remarks of Senator Curtis) Had HEW had clear authority to reimburse State payments for emergency needs as AFDC special needs, States would not have needed to ask for § 406(e), as the Senator stated. They would have followed the established route. But the lack of express federal authority was a deterrent to the use of such a route because the risk of spending unmatchable funds is not lightly undertaken by a State.



be an after-thought to justify a record which the court of appeals characterized as in "blatant disregard of the congressional eligibility requirements. . . ." *Mandley II*, 545 F. 2d at 1064.

Petitioners cannot satisfactorily interpret the express language of Congress in order to achieve the result they seek: unrestricted use of federal funds by the State and a highly arbitrary administration of aid to society's most unfortunate victims. HEW may think it unreasonable that federal funds are allocated to States with "strings" attached, but Congress ties them to this aid. *Helvering* v. *Davis*, 301 U. S. 619, 645 (1937); *Rosado* v. *Wyman*, 397 U. S. 397, 420-423 (1970).

A fundamental principle of equity is applicable here, and the court of appeals applied it: A court of equity will never lend its aid to accomplish by indirection what the law or its clearly defined policy forbids to be done directly. The court of appeals correctly held that the express congressional provisions on emergency assistance required Illinois to provide this aid, however designated, through the eligibility requirements of § 406(e).

## III.

### THE JUDGMENT APPROVED AND ORDERED ENTERED IN MANDLEY II CAN BE UPHELD ON THE BASIS OF THE EQUAL PROTECTION AND STATE LAW CLAIMS PRESSED BELOW.

In addition to the reasons stated in Parts I and II, the final judgment approved and ordered entered in *Mandley II* can be sustained on alternative grounds, on either the equal protection or the State law claims. The district court ruled on the equal protection claim in favor of petitioners and declined to rule on the pendent State claim. Respondents appealed and argued both rulings to the court of appeals in *Mandley I*. That court did not decide them because it held for respondents on the Supremacy Clause claim. Should it be necessary to reach these issues for disposition of this case, respondents respectfully re-

quest this Court to decide one or both, as necessary, rather than remand for decision by the courts below.

### A. Illinois' Emergency Assistance Program Invidiously Discriminates Against Needy Families with Children in Violation of the Equal Protection Clause Because It Grants Assistance to an Arbitrarily Selected Class and Denies It to All Others Without Relation to a Legitimate State Purpose, and Without Justification by a Compelling Governmental Interest.

Illinois' program creates two classes of families with needy children who are living with a relative, without resources, and for whom aid is necessary to provide living arrangements or to avoid destitution. § 406(e). One class can receive assistance because its need arose from Illinois' selected crisis situations; the other class cannot because its need arose from other crisis situations. Illinois' arbitrary selection of *events* from which destitution threatens does not rationally further the purposes of § 406(e) nor any other legitimate, articulated State interest. *United States Department of Agriculture* v. *Moreno*, 413 U. S. 528 (1973); *Burrell* v. *Norton*, 381 F. Supp. 339 (D. Conn. 1974). In addition, the arbitrarily excluded class is denied or threatened with denial of the fundamental right to life itself. The classification is therefore subject to strict judicial scrutiny, and such scrutiny reveals no compelling State justification.

#### 1. The Discrimination in Illinois' Program Is Arbitrary and Is Not Related to Any Legitimate State Interest.

Congress in the emergency assistance program intended to avoid destitution of needy children by providing immediate assistance in a crisis situation. The Illinois legislature's purpose is equally clear in the Public Aid Code, Ill. Rev. Stat. ch. 23, § 12-8[26] which creates a fund

26. Section 12-8 is set out in full in the Appendix to this brief.



> [t]o provide emergency aid to recipients . . . who have failed to receive their grants because of mail box or other thefts, or who are victims of a burnout, eviction, or other circumstances causing privation, in which cases the delays incident to the issuance of grants from appropriations would cause hardship and suffering.

The discrimination in the challenged program, a creation not of any legislative body, but of appointed officials, greatly impairs fulfillment of these legislative purposes. Illinois' program fails to include even the examples specifically enumerated in the statutes and legislative history, *e.g.*, provision of living arrangements in a home, eviction, utility turnoffs, abandonment of children, theft, nonreceipt of grants. The exclusion of a family such as respondent Mrs. Gallman's from benefits solely because her admittedly dire emergency arose from a robbery rather than one of IDPA's four categories defeats the purpose of § 406(e) and § 12-8.

"[W]hen a State decides to alleviate some of the hardships of poverty . . . the manner in which it dispenses benefits is subject to constitutional limitations." *Maher* v. *Roe*, ____ U. S. ____, 53 L. Ed. 2d 484, 492 (1977). "Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made." *Baxtrom* v. *Herold*, 383 U. S. 107, 111 (1966).

The governmental interest which Illinois has asserted for its discrimination are unacceptable under the Equal Protection Clause. First, the IDPA deputy director testified that one important consideration in restricting eligibility was the administrative ease gained by enumeration of specific events.[27] Ease of administration can be accomplished in many ways, for example, by allowing all requests by persons whose names begin with A-H, or

27. "So, we wanted to, No. 1, limit the program to some emergent situations that were common and specific and would leave little doubt once that situation was verified that it did, in fact, constitute an emergent situation which would create a state of fairly—a program that could be administered fairly well." Tr. 366.

only children of Caucasian race, or only victims of fires. Such arbitrary means to administrative ease cannot be countenanced under the Equal Protection Clause in light of the goals of § 406(e) and the Illinois Public Aid Code. *Vlandis* v. *Kline*, 412 U. S. 441, 451 (1973); *Stanley* v. *Illinois*, 405 U. S. 645, 656 (1972); cf. *Goldberg* v. *Kelly*, 397 U. S. 254, 265-66 (1970).

Second, the deputy director testified that some types of emergency situations were excluded to prevent possible "abuses" of the program.[28] No substantiation of any abuses was offered. The credibility of a claimant may be at issue in any request for governmental assistance, be it AFDC, emergency assistance, or a tax deduction. Like the taxpayer signing his tax return, the applicant for public assistance files falsely under penalty of perjury and criminal prosecution. Conclusively to presume that all persons experiencing emergencies not enumerated in Illinois' program are abusers and to deprive them of an opportunity to establish the legitimacy of their claims is an unconstitutional presumption. *Jimenez* v. *Weinberger*, 417 U. S. 628 (1974).

Furthermore, Illinois has alternative less onerous tools for the problem of fraudulent claims. See *United States Department of Agriculture* v. *Moreno*, 413 U. S. 528, 535-38 (1973).

a. IDPA can disallow a claim if it disbelieves the client after an attempt at verification.

b. If it later appears that the client has obtained funds improperly, IDPA can recoup from future assistance payments, 45 C. F. R. § 233.20(a)(12), prosecute the person criminally, or file an action for damages. Ill. Rev. Stat. ch. 23, § 11-21.

c. In the case of parental mismanagement of an AFDC grant, IDPA can utilize its protective payment program whereby

28. "I said that we should not include any provision in the revised program for replacement of stolen cash since it was extremely difficult to administer such a program due to the fact that it was difficult to verify the incident of robbery as well as extremely difficult to verify the amount of the loss. I felt that it would be open to abusage." Tr. 393-94.



a responsible person is given authority to manage the grant. Ill. Rev. Stat. ch. 23, §§ 4-8 and 4-9; 42 U. S. C. § 606(b)(2).

Saving money appears to be the State's true purpose for its classifications. This interest in the welfare context is not a proper basis for the absolute exclusion of a class whose needs are identical with the class receiving aid. Illinois has other means to reduce costs, as discussed herein and in Part I, *supra*. *Shapiro* v. *Thompson*, 394 U. S. 618, 633 (1969); cf. *Townsend*, 404 U. S. at 292 n. 8. (1971).

**2. The Discrimination in Illinois' Program Impairs the Right to Survive, a Fundamental Right, and Is Not Justified By a Compelling State Interest.**

A family denied aid necessary to avoid destitution is deprived of the very right to survive, a fundamental right protected by the Fifth and Fourteenth Amendments. See, *e.g.*, *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370 (1886). The class of respondents whom Illinois has made ineligible for emergency assistance are threatened with or have experienced deprivation of this right at the hands of government. Such a brutal policy must be justified by a compelling State interest.

This Court recognized in *Shapiro* v. *Thompson*, 394 U. S. 618, 627 (1969), that arbitrary denial of welfare aid illegally deprives a family of the ability "to obtain the very means to subsist—food, shelter, and other necessities of life." This Court in *Goldberg* v. *Kelly*, 397 U. S. 254, 264 (1970), also noted that where welfare provides the means for survival the denial of aid makes a family's situation "immediately desperate."

The denial by our government of emergency assistance to children eligible for it is perhaps the cruelest kind of discrimination visited upon a family. Unlike the deprivation to the plaintiffs in *Dandridge* v. *Williams*, 397 U. S. 471 (1970), and *Jefferson* v. *Hackney*, 406 U. S. 535 (1972), which involved solely *reductions* in aid, families in this case have no resources and receive *no* aid. In addition, the consequences to our society may

also be grave, as this Court in *Goldberg* v. *Kelly*, 397 U. S. 254 (1970), has observed. "[W]elfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity." *Id.* at 265. Emergency assistance relieves individual suffering and thus aids society by reducing the instability inherent in destitution. The right to receive emergency assistance is equivalent to the right to survive, which is fundamental in our constitutional system.

Restrictions in the Illinois program cannot stand. They are not justified by a compelling state interest. Under strict judicial scrutiny Illinois' program violates the Equal Protection Clause.

### B. Illinois' Program Excludes Persons Made Eligible by the Emergency Assistance Provisions of the Illinois Public Aid Code.

Count I of the amended complaint alleged that the Illinois petitioners' program violates the emergency provisions of the Illinois Public Aid Code, Ill. Rev. Stat. ch. 23, § 12-8, by failing to grant assistance in circumstances specified therein. The district court dismissed this pendent claim stating, "this contention is not cognizable as a pendent action if the principal action fails."

The district court was incorrect. A State law claim is cognizable under the doctrine of pendent jurisdiction, even where the principal action—the claim conferring jurisdiction—fails. *United Mine Workers* v. *Gibbs*, 383 U. S. 715 (1966). Respondents appealed from the dismissal of the pendent claim, but the issue was not reached in the appeals court decision. The district court abused its discretion in declining to decide the pendent claim, *Rosado* v. *Wyman*, 397 U. S. 397, 403-05 (1970); *United Mine Workers* v. *Gibbs*, 383 U. S. 715, 727 (1966).

On the merits of this issue, the IDPA's restrictive emergency assistance program is contrary to the legislative command set out in § 12-8 to provide emergency aid to recipients of AFDC in specified circumstances and in "other circumstances causing privation." To give effect to the language and purpose of the Code, Illinois must provide assistance when delays would cause "privation," "hardship and suffering." This is mandatory. See also, Ill. Rev. Stat., ch. 23, §§ 1-5 and 12-13.



The IDPA's failure to comply with this statutory mandate is clear from the face of the emergency assistance program and from the testimony of IDPA officials at trial. They claimed that § 12-8 is not mandatory but merely an "administrative device" allowing the IDPA use of these funds at its discretion.

Illinois judicial decisions interpreting related provisions of the Code have rejected IDPA's discretion argument. In *Figures* v. *Swank*, 128 Ill. App. 2d 211, 263 N. E. 2d 559 (1970), the IDPA took the position that it had "an absolute, unregulated discretion under the Public Aid Code to pay or not to pay" security deposits authorized by § 12-4.11 of the Code. The argument was not accepted by the Illinois Appellate Court "because a statute or ordinance which in effect reposes an absolute, unregulated, and undefined discretion in an administrative agency bestows arbitrary powers and is an unlawful delegation of legislative powers. [citation omitted]." *Id.* The Illinois Supreme Court in *County of Cook* v. *Ogilvie*, 50 Ill. 2d 379, 280 N. E. 2d 224 (1972), also declined to adopt a similar IDPA argument.

The Illinois petitioners' emergency assistance program is inconsistent with the plain language and purpose of the statute and applicable judicial interpretation. The judgment in this case with respect to AFDC eligible individuals can be sustained on the basis of the State law claim.[29]

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29. Section 12-8 does not extend emergency assistance to needy families not eligible for AFDC or AFDC/UF. Thus a decision on the equal protection claim would be needed regarding this portion of the class if the State law claim is sustained.

## IV.

## The Relief Granted in Mandley II Against the Federal and State Petitioners Was Necessary to Secure Their Compliance with the Court's Decisions and to Afford Relief to the Respondent Class.

### A. The Court of Appeals Properly Exercised Its Discretion in Ordering Relief Against HEW.

The court of appeals in *Mandley II* properly exercised its authority in ordering HEW to change its administration of the emergency assistance program to conform with § 406(e). The court of appeals had suggested in *Mandley I* that HEW use its rulemaking authority to assist the States in determining the scope of eligibility for emergency assistance.[30] Instead of following that advice or seeking review in this Court, HEW participated in the evasion of *Mandley I*. Consequently, in *Mandley II* the court of appeals concluded that relief against HEW was necessary in order to protect respondents and to provide guidance to Illinois. Accordingly, the court ordered HEW enjoined[31] from approving plans not in conformity with § 406(e) and directed HEW to issue a new conforming regulation.

The Secretary objects because a regulation would have nationwide application. Now that the case is before this Court, a decision on the merits will have that effect. Important here is the appropriateness of the injunction requiring HEW to promulgate a regulation. Had HEW followed the court of appeals' counsel in *Mandley I*, the evasion found to have occurred

30. The court stated, "The problem of setting workable definitions for the somewhat amorphous eligibility criteria in Section 606(e) may be addressed by HEW rulemaking. [Footnote omitted.] Such rulemaking should aid the States in preparing programs that are in accord with the eligibility criteria set by Congress." 523 F. 2d at 422-23.

31. In *Mandley II* respondents urged the court of appeals to approve and direct of the entry of the proposed final judgment. Brief of Plaintiffs-Appellants, No. 76-1865 (7th Cir.) at 39.



on remand might have been avoided. When then-IDPA Director James L. Trainor testified before the Illinois Legislative Advisory Committee on Public Aid on November 17, 1975, about the plan to claim emergency assistance funds as "special assistance", he stated that he intended

> ". . . to suspend the present program and seek to obtain from HEW a definition of an emergency assistance program. Pending that definition . . . , we would create a new program under AFDC and recognize a special need covering essentially the same items that we now cover under what the Court says is an invalid emergency assistance program." App. 85-86.

The Illinois petitioners' desire for guidance from HEW appears to have been genuine and their expectation of prompt response by HEW reasonable (although this does not excuse the illegal "special assistance" plan). The failure of HEW to issue regulations may have contributed to Illinois' efforts to mislead, delay and confuse the district court. On the other hand, forthrightness on HEW's part, either by publishing regulations in compliance with the decision, or by petitioning for certiorari *at the time*, would surely have prevented the lengthy and oppressive chronology which the court of appeals confronted in *Mandley II*.

In this context, the court of appeals exercised restraint in first suggesting to HEW in *Mandley I* that it exercise its rulemaking power in revising its administration of emergency assistance. When the case reached the court of appeals the second time, on this record, the court was amply justified in requiring HEW to comply with its decision by promulgating a regulation. As this Court long ago recognized, "there is inherent in the Court of Equity a jurisdiction . . . to give effect to the policy of the legislature." *Clark* v. *Smith*, 13 Pet. (38 U. S.) 195, 203; *Mitchell* v. *DeMario Jewelry, Inc.*, 361 U. S. 288, 291-92 (1960).

Contrary to the Secretary's statement that his rulemaking authority is wholly discretionary, br. at 39-40, § 1102 of the

Act, 42 U. S. C. § 1302, provides that the Secretary *"shall"* issue regulations "necessary to . . . efficient administration". (Emphasis added). This language is mandatory just as it is in the Medicare provisions, 42 U. S. C. § 1395x(v)(1), on which the Court of Appeals for the Second Circuit based its order requiring the Secretary to promulgate regulations in *Kingsbrook Jewish Medical Center* v. *Richardson*, 486 F. 2d 663 (1973). The federal court which sees that the absence of a regulation is causing unlawful expenditure of federal funds, which sees the federal and State agencies engaging in a complicated artifice to avoid its prior decision (hardly "efficient administration"), may, within its mandamus jurisdiction and in exercise of its equitable powers to effect complete relief, order the Secretary to perform its mandatory duty to issue regulations.

The Secretary does not recognize or admit that his own conduct produced this result. He instead claims that injury will ensue to beneficiaries of the program if he is required to promulgate a regulation. Harm will result, the Secretary says, if another State declined to meet the federal eligibility standards and ceased making any emergency assistance payments. A State's participation in the emergency assistance program is, like its participation in AFDC, not mandatory. The decision to participate is largely a political one. Involved are important questions of social welfare policy, such as whether a civilized nation would abandon its own children who because of unfortunate circumstances are without resources, rather than issue them modest emergency aid. See also, *Goldberg* v. *Kelly*, 397 U. S. 254, 264-65 (1970).

Furthermore, the Secretary does not explain how relief against HEW in Illinois could lawfully be severed from its nationwide administration of the Act. The Secretary apparently desires to administer the emergency assistance provisions of the Act in selective fashion among the States. Assuming he abides by *Mandley* in Illinois, it appears he intends to ignore it in other States. He opposes the issuance of a regulation because it



will not allow him complete discretion. An agency should not be permitted to enforce the Act throughout the nation in such an arbitrary and disparate fashion. This is particularly true here, where three courts of appeals have ruled that the Secretary's interpretation of § 406(e) is erroneous. HEW should respect these decisions and revise its regulations accordingly.

As a practical matter, proper administration of the multimillion dollar emergency assistance program cannot be accomplished without regulations. The Court of Appeals for the Second Circuit in *Lynch* v. *Philbrook*, 550 F. 2d 793, 795 (1977), which invalidated Vermont's emergency assistance program, observed, "[T]he welfare statutes now rival the Internal Revenue Code in complexity. . . ."

Respondents as intended beneficiaries of emergency assistance under the Act have been injured by HEW's erroneous interpretation and administration of the governing provisions. They have an interest in ensuring that proper regulations are issued and that federal funds are used as Congress intended. *Rosado* v. *Wyman*, 397 U. S. 397 (1970). After the evasions of *Mandley I*, the relief granted was necessary to achieve compliance. The nationwide effect of such relief is incidental and should not deprive respondents of relief found to be otherwise proper and necessary.

### B. The Relief the Court of Appeals Approved to Overcome Illinois' Delays in Furnishing Assistance Was Not Objected to Below and Was Proper.

Illinois claims first that the final judgment order requires it to participate in the federally funded emergency assistance program, and second, that it imposes overly burdensome requirements for processing emergency assistance payments. The order does not require Illinois to participate in the federally funded emergency assistance program as these petitioners assert. Final Judgment and Decree, Par. A, App. 147. The fact is, however, Illinois continues to participate in the program and to receive federal funding for it.

After *Mandley I*, Illinois decided not to abandon its illegal emergency assistance program because it found that alternative "totally unacceptable". This decision is reflected in a document entitled Status of Litigation, App. 72-76, filed by Director Trainor with the Illinois Legislative Advisory Committee on Public Aid on October 30, 1975:

> II. ALTERNATIVES
>
> * * *
>
> B. ELIMINATE THE 606(e) PROGRAM. Under the law we are entitled to eliminate the program. . . . The Department, although believing this alternative to be legally acceptable, *finds this alternative totally unacceptable*. . . . (Emphasis added) App. 74.

Illinois did not withdraw from its emergency assistance program in a bona fide way but decided instead to engage in the subterfuge struck down in *Mandley II*.

After *Mandley II* the State petitioners again advanced a claim that they had ceased claiming federal reimbursement for their emergency assistance program. However, they admitted in discovery to (1) claiming and receiving federal reimbursement for the administrative cost of the program; (2) pursuing internal appeals within HEW to recover disallowed claims for reimbursement; and (3) declining to refund to HEW all money illegally obtained.[32] Illinois has yet to find that a complete abandonment of its program is an acceptable alternative.

In response to the second assertion, that the provision of the order requiring it to verify eligibility and authorize payment within 24 hours of a request precludes "the state's need for adequate verification" (Il. br. 33), respondents note, as does Illinois, that the provision complained of contains two exceptions[33] excusing delay. But Illinois suggests, without reference to any evidence in the record, that these protections will not suffice to guard aganist improper payments.

32. Dep. of B. Sticher 46, 87ff. (Jan. 12, 1977); evidentiary exhibits submitted with Reply Memorandum in Support of Plaintiffs' Pending Motions for rule to show cause against the Illinois petitioners, filed Mar. 3, 1977.



Illinois' objection is untimely and without merit. When ordered by the district court to file objections to the proposed final judgment, Illinois did not object to the findings of fact, conclusions of law, or the specific relief ordered concerning delays. It presented no objections in *Mandley II*.[34] The waiver of objections precludes Illinois from raising them here. *Lawn v. United States*, 355 U. S. 339, 362 n. 16 (1958).

After the district court found in its November 21, 1974, decision that delays of 7-10 days in delivery of assistance were "not uncommon", it labored for over a year to document the need for expedited procedures and to devise new ones. It gave full consideration to the State's objections to changes the court or respondents suggested. The proposed final judgment incorporated the district court's conclusions and findings on this issue. The order was reviewed and approved by the court of appeals, and it is fully supported by the Act, the legislative history (Part I above) and HEW regulations requiring delivery of payments forthwith. 45 C. F. R. § 233.120 (a)(5).[35]

Moreover, HEW by regulation has relieved states of fear that payments will not be matched because of inadequate verification. HEW regulations specifically exempt emergency assistance payments from the strict AFDC quality control re-

33. One exception is for delays caused by an applicant and the other allows the State to request a waiver of the 24 hour standard from the applicant. App. 151.

34. After the final judgment was entered by the district court Illinois moved to amend it, raising the objections presented here. Motion to Alter or Amend Judgment, filed Dec. 10, 1976.

35. In addition, 45 C. F. R. § 206.10(a)(5) requires medical care and services in emergency situations to be available on a 24 hour, 7 days a week basis. See also 45 C. F. R. §§ 220.51(a)(2), 226.1(a)(7)(iii)(b).

view which imposes financial penalties for improper authorizations of AFDC. 45 C. F. R. §§ 205.40 and 205.41. A State policy which allows delivery of emergency assistance to be stalled in the regular, detailed administrative channels, would conflict with the federal policy.

Illinois acknowledges that emergency assistance should be given at an "accelerated pace". Il. br. 33. The record reflects no commitment to accomplish that; it reflects the contrary. The order was just and necessary.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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September, 1977.



## APPENDIX

SEN. REP. No. 744, 90th Cong., 1st Sess. 165-166, provides in part:

(i) *Temporary emergency assistance.*

The (Senate Finance) committee's bill is concerned with several major objectives—to assure needed care for children, to focus maximum effort on self-support by families, and to provide more flexible and appropriate tools to accomplish these objectives. The bill broadens the provisions of protective payments, authorizes vendor payments, provides a work-incentive program, expends foster care for children, and makes day care available where needed to children of working parents. Thus, it materially improves the program in relation to the care and protection of children.

The committee understands that the process of determining AFDC eligibility and authorizing payments frequently precludes the meeting of emergency needs when a crisis occurs. In the event of eviction, or when utilities are turned off, or when an alcoholic parent leaves children without food, immediate action is necessary. It frequently is unavailable under State programs today. When a child is suddenly deprived of his parents by their accidental death or when the agency finds that conditions in home are contrary to the child's welfare, new arrangements and court referrals may have to be made.

To encourage public welfare agencies to move promptly and with maximum effectiveness in such situations, the bill contains an offer to the States of 50-percent participation in emergency assistance payments and the usual 75-percent participation in social services that may be provided. Under the House bill, the time period in which such assistance might be provided is limited to one period of 30 days or less

in any 12-month period. Under the committee bill the period would be 60 days rather than 30. The eligible families involved are those with children under 21 who either are, or have recently been, living with close relatives. The families do not have to be receiving, or eligible upon application to receive, AFDC (although they are generally of the same type), but they must be without a [*sic*] available resource and the payment or service must be necessary in order to meet an immediate need that would not otherwise be met.

Assistance might be in any form—money, medical aid, payment of rent or utilities, orders from food or clothing stores, etc. The provision is broad enough that emergencies can be met in migrant families as well as those meeting residence requirements of the State's AFDC program. Its utilization would be optional with the States.

The committee bill would also authorize emergency assistance for migratory labor families. The latter provision is in addition to those contained in the House bill.

PART 233—COVERAGE AND CONDITIONS OF ELIGIBILITY IN FINANCIAL ASSISTANCE PROGRAMS

* * * * *

§ 233.10 General provisions regarding coverage and eligibility.

(a) State plan requirements. A State plan under title I, IV-A, X, XIV, or XVI, of the Social Security Act must:

(1) Specify the groups of individuals, based on reasonable classifications, that will be included in the program, and all the conditions of eligibility that must be met by the individuals in the groups. The groups selected for inclusion in the plan and the eligibility conditions imposed must not exclude individuals or groups on an arbitrary or unreasonable basis, and must not result in inequitable treatment of individuals or groups in the light of the provisions and purposes of the public assistance titles of the Social Security Act. Under this requirement:



(i) A State shall impose each condition of eligibility required by the Social Security Act; and

(ii) A State may:

(A) Provide more limited public assistance coverage than that provided by the Act only where the Social Security Act or its legislative history authorizes more limited coverage. . . .

HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION.

Part IV.

ELIGIBILITY AND PAYMENTS TO INDIVIDUALS

3400-3499 12/10/62

*Aid to Families with Dependent Children*

* * * * *

3434.2

*Temporary Arrangements in Emergencies.*—In emergency situations that deprive the child of the care of the parent through whom he has been receiving aid to families with dependent children, Federal participation will be available for payments made to persons acting for relatives specified in this interpretation, because of the necessity which the emergency creates, for a temporary period. Such situations are those in which there has been insufficient time to make any other plan for the child's care or support, including receipt of assistance in his behalf, as in cases of the parent's sudden death, desertion, imprisonment, or commitment to a hospital for the mentally ill. A temporary period is a period limited to that actually necessary to make and carry out plans for the child's continuing care and support.

In operating under this interpretation the State agency may regard the child's eligibility as continuing for a temporary period while plans are being made for him, provided the following criteria are met:

1. Payments on behalf of children for whom no parent or relative is immediately responsible are made only for children who are recipients of aid to families with dependent children at the time the emergency occurs.
2. Payments on a temporary emergency basis are made only for the purpose of carrying out active planning for continuing care of the child.
3. Payments are made only for a period of time necessary to make and carry out plans for the child, including the transfer of responsibility for the child to another agency or community program, or to determine that no further resources exist in that community to meet the child's need.

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5233. *Emergency Payee.*

In emergency situations that deprive the child of the care of the parent or relative through whom he has been receiving aid to dependent children, Federal participation is available for a temporary period with respect to payments made to persons acting for relatives with whom a dependent child is or was living, because of the necessity which the emergency creates. Such situations are those in which there has been insufficient time to make any other plan for the child's care and support, including the provision of assistance, as in cases of the relative's sudden death, desertion, imprisonment, or commitment to a hospital for the mentally ill. A temporary period is a period limited to that actually necessary to make and carry out plans for the child's continuing care and support. (See IV-3434.2.)

Federal participation is available with respect to payments made to persons acting in the emergency for parents or relatives with whom a dependent child is or was living, if the following criteria are met:

a. Payments on behalf of children for whom no relative is immediately responsible are made only for children who are recipients of aid to dependent children at the time the emergency occurs.



b. Payments on a temporary emergency basis are made only for the purpose of carrying out active planning for the continuing care of the child.
c. Payments are made only for a period of time necessary to make or carrry out plans for the child, including transfer of responsibility for the child to another agency or community program, or to determine that no further resources exist in the community to meet the child's need. (See IV-3434.2 and 3435.2.)

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## PART IV.

## ELIGIBILITY AND PAYMENTS TO INDIVIDUALS.

5000-5999 *Payments to Individuals* 3/5/51

(This policy was issued in Bureau Circular No. 9 on 10/25/41)

5520. *Principles Governing Federal Participation in Assistance Payments Made Prior to Complete Investigation of Eligibility.*

The following policy statement relating to Federal participation in assistance payments made prior to complete investigation of eligibility was approved by the Social Security Board on October 8, 1941.

• • • • •

3. *Special Procedure for Assistance Payments Prior to Completion of Eligibility Investigation.*

However, during the first months of the operation of the State plan, or in emergency situations thereafter, where the circumstances of an applicant's need warrant special consideration, payments made prior to complete investigation of eligibility, if authorized as categorical assistance prior to payment, may be subject to Federal participation under the conditions specified below.

a. Decision to grant assistance prior to completion of investigation must be made on the basis of facts which indicate presumptive eligibility.

b. Such payments would be made by the State on its own responsibility and cannot be matched with Federal funds until investigation is completed and eligibility established.

c. The award must be authorized in advance of payment as categorical assistance either as old-age assistance, aid to the blind, aid to dependent children, [or aid to the permanently and totally disabled.]

d. Federal participation made on authorization prior to complete investigation and establishment of eligibility cannot be claimed until after the investigation has been completed and eligibility for the period of payment has been established.

e. If the investigation is not completed within a period of 3 months beginning with the month in which payment was started, Federal participation will not be available for payments made prior to the completion of the investigation.

f. The special procedure for assistance payments prior to completion of eligibility investigation must be provided for in the approved State plan.

4. *Administrative Procedures for Assistance Payments Made Prior to Complete Eligibility Determination.*

If payments are made prior to the complete establishment of eligibility, it is necessary for the State agency to install acceptable administrative procedures and methods of recording, identifying, and following up of such cases, to accomplish the following objectives: (a) determination that circumstances warrant the granting of categorical public assistance prior to the completion of investigation; (b) the awarding of categorical public assistance prior to the making of the first payment for which Federal participation is to be claimed; (c) the completion of investigation; (d) the preclusion of claim for Federal participation until the investigation is completed and eligibility determined;



(e) the determination that Federal participation may now be claimed; and (f) the prompt cessation of payments as categorical public assistance subject to Federal participation when the recipient is found to be ineligible.

Acceptable administrative procedures in such instances should provide that the evidence of authorization clearly shows, among other things, two administrative decisions: (a) presumptive eligibility and (b) intention to pay categorical public assistance. The wording of the authorizations should affirmatively state both of these decisions. Payments made as a result of such authorizations should be handled separately from regular payments. They should either be recorded on separate assistance rolls, separately columnized on the same assistance roll, or clearly identified on the assistance roll by some symbolic marking and, at the foot of this assistance roll, the total of all such payments and the total of all regular payments summarized so that the amount of the particular assistance roll for which Federal participation should be claimed will be clearly shown. When the investigation is completed and eligibility is established, a confirming authorization should be issued changing the status of the award to that of a regular award. During the interim between the authorization to pay categorical public assistance and the completion of investigation, a separate record of such cases should be maintained for the purposes of follow-up and subsequent determination of claim for Federal funds if the investigation results in the establishment of complete eligibility.

The established procedures for reporting claims for Federal participation through Quarterly Statements of Expenditures are adequate to cover the reporting of payments made prior to complete investigation of eligibility, if the investigation is completed and confirming authorization of eligibility is issued during the quarter in which the payments are made. Payments in such case will be reported as current expenditures in the same manner as regular payments.

If the investigation of eligibility is not completed and confirming authorization of eligibility is not issued *within the quarter in which the payments are made*, such payments will not be reported for purposes of Federal participation in the Quarterly Statement of Expenditures for the quarter in which they are made. Such payments *for a prior quarter or quarters* will be reported in Schedule B "Adjustment of Assistance Expenditures for Prior Periods" in the Quarterly Statement of Expenditures covering the quarter in which the investigation has been completed and confirming authorization of eligibility issued.

ILL. REV. STAT. CH. 23, § 12-8.

§ 12-8. *Public Assistance Emergency Revolving Fund—Uses.*

The Public Assistance Emergency Revolving Fund, established by Act approved July 8, 1955 and held by the State Treasurer as ex-officio custodian outside of the State Treasury, shall be used for the following purposes:

1. To provide immediate financial aid to applicants in acute need who have been determined eligible for aid under Articles III, IV, or V [AFDC, Aid to Aged, Blind and Disabled, and Medical Assistance, respectively].
2. To provide emergency aid to recipients under said Articles who have failed to receive their grants because of mail box or other thefts, or who are victims of a burnout, eviction, or other circumstances causing privation, in which cases the delays incident to the issuance of grants from appropriations would cause hardship and suffering.
3. To provide emergency aid for transportation, meals and lodging to applicants who are referred to cities other than where they reside for physical examinations to establish blindness or disability, or to determine the incapacity of the parent of a dependent child.
4. To provide emergency transportation expense allowances to recipients engaged in vocational training and rehabilitation projects.



5. To establish petty cash funds to meet immediate needs, such as making payment on postage due and the purchase of incidental and inexpensive commodities necessary for immediate needs where the vendor insists upon a cash transaction.
6. To establish an account for other emergency administrative expenses as determined by the Illinois Department to be necessary for the effective administration of this Code.

Disbursements from the Public Assistance Emergency Revolving Fund shall be made by the Treasurer upon the order of the Illinois Department.

Expenditures from the Public Assistance Emergency Revolving Fund shall be for purposes which are properly chargeable to appropriations made to the Illinois Department. The Illinois Department shall reimburse the Public Assistance Emergency Revolving Fund by warrants issued by the Auditor of Public Accounts on the appropriation or appropriations which are so chargeable, payable to the Revolving Fund. 1967, April 11, Laws 1967, p. 122, § 12-8.